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Supreme Court of the United States

October Term, 1973

No. 73-696

THE EMPORIUM CAPWELL CO., *Petitioner,*

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, *Respondent.*

No. 73-830

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae,* in support of the position of the National Labor Relations Board, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

The question in this case is whether § 7 of the National Labor Relations Act protects employees from being discharged for engaging in picketing and other concerted

activity, the purpose of which is to secure acquiesence to their "demand that [their Employer] bargain with the picketing employees for the entire group of [its] minority employees," (485 F.2d at 929, n. 34), concerning the latter's alleged practice of racial discrimination in making promotions and in other aspects of employment, where the picketing takes place in a context in which a union has been certified by the National Labor Relations Board as the exclusive bargaining representative both of the pickets and of the "minority employees" whom the pickets seek to represent, and the picketing employees' tactics are not sanctioned by the Union (which is seeking to resolve the dispute by pressing to arbitration grievances for alleged violations of a contractual "no discrimination" clause). Indeed, it warrents emphasis that the foregoing question as to the scope of the *NLRA's* prohibition of discharges for concerted activity is the sole question presented since this proceeding does not involve any charge against the Employer under other federal (or state) laws, and since there are no charges of unlawful conduct against the pickets.

The Board held that § 7 does not protect the class of concerted activity here involved. (192 NLRB No. 19) The Court of Appeals, however, held that § 7 does protect such concerted activity except in those cases in which the Board concludes "the union was actually remedying the [alleged racial] discrimination to the *fullest extent possible, by the most expedient and efficacious means.*" (485 F.2d at 931; emphasis in original). The D. C. Circuit's holding was premised on the understanding that the question before it was *res nova* and that it was free to write on a clean slate. That assumption is entirely incorrect. For, as we now demonstrate, this Court's decisions, most particularly *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, and its

progeny, are rooted in an understanding of what the NLRA is all about that mandates the conclusion reached by the Board.

1. (a) Prior to the passage of the NLRA, the employers now covered by that Act had a privilege under federal law (as well as state law) to discharge their employees for good reason, bad reason or no reason at all. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45. The purpose of § 8(a)(1) of the Act is to limit that freedom in those instances in which a discharge is for concerted activity protected by § 7 (*Id.* at 45-46.) But § 7 does not protect all forms of "concerted activity for the purpose of collective bargaining or other mutual aid or protection," or even all those which are peaceful and not independently unlawful. In *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, which was decided some 9 years prior to the enactment of § 301 (the provision which makes collective agreements legally enforceable), this Court after noting that the "legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made," (*id.* at 342), held:

> "[The Company] rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer * * * Compare National Labor Relations Bd. v. Fansteel Metallurgical Corp. 306 U.S. 240." (*Id.* at 344.)

Thus, *Sands* stands for the proposition that to assure that the component portions of the Act are read to further, rather than to defeat, its ultimate purpose, self-help to support bargaining demands is within § 7's protective ambit only where the bargaining sought comports with the "practice and procedure of collective bargaining" that it was Congress' purpose to "encourag[e]," (§ 1).[1]

(b) It is well settled that once the members of an appropriate bargaining unit have selected their representative

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9(a) of the Act, * * * it exacts 'the negative duty to treat with no other.' National Labor Relations Bd. v. Jones & L. Steel Corp. 301 US 1, 44; and see Virginian R. Co. v. System Federation, R. E. D. 300 US 515, 548, 549."
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> * * * *
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> "[I]t is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions. * * * J. I. Case Co. v. National Labor Relations Bd. [321 US 332]; cf. Order of R. Telegraphers v. Railway Exp. Agency [321 US 342].

[1] See also *International Union UAW* v. *Wisconsin Emp. Rel. Bd.*, 336 U.S. 245 and *Labor Board* v. *Insurance Agents International*, 361 U.S. 477, which "establish that [at least some form of concerted slowdowns are] not a protected concerted activity," (361 U.S. at 492-493). Of course, as *Insurance Agents* holds, the fact that activity is unprotected and that the NLRA does not limit the employer's privilege of discharge is not a predicate for the conclusion that that activity is "unlawful as a matter of federal law," (*id.* at 495).

> * * * *
>
> "That the Act 'carries the clear implication that employers shall not interfere' with the right of collective bargaining 'by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all,' was recognized by the reports of the congressional committees recommending the adoption of the bill which became the National Labor Relations Act. Sen. Rep. No. 573, 74th Cong. 1st Sess. p. 13; H. Rep. No. 1147, 74th Cong. 1st Sess, p. 20." (*Medo Photo Supply Co.* v. *Labor Board*, 321 U.S. 673, 683-684 & n. 2)

In short, the "majority rule concept is today unquestionably at the center of our labor policy." (*NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180.)

(c) The conclusion that follows ineluctably is that § 7 does not protect self-help by a splinter group of employees in a bargaining unit that has chosen a § 9(a) representative to support the minority's demand that their employer bargain with them concerning some or all of their terms and conditions of employment. To be sure, under the NLRA the use of self-help in support of bargaining demands "is not a grudging exception," (*Insurance Agents*, 361 U.S. at 495). But, as *Sands* demonstrates, the Act does not sanction economic warfare for its own sake. Self-help "is part and parcel of the process of collective bargaining * * * [since it is] 'a prime motive power for agreements,'" (*Insurance Agents*, 361 U.S. at 488-489). Thus, self-help in support of bargaining demands like all other aspects of the collective bargaining process

> "is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the

employer." (H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20; 2 Legislative History of the National Labor Relations Act of 1935, p. 3070.)

And, the "collective agreements" the Act encourages are those negotiated by a majority representative and applicable to all members of the bargaining unit. The House Report, in the sentence after that just quoted, states "There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides." (*Id.*) Precisely because this is so, the reasoning of Judge Parker in *NLRB* v. *Draper Corp.*, 145 F.2d 199, 203, 205 (C.A.4), is unanswerable:

> "The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. • • • It is perfectly clear not only that the 'wild cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act to promote. Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work.
>
> • • • •
>
> "[M]inorities who engage in 'wild cat' strikes, in violation of rights established by the collective bargaining statute, can find nothing in that statute which protects them from discharge. In the absence of the statute, there was nothing in the law which forbade the discharge of strikers. There is nothing in the statute, properly construed, which protects from discharge those who strike in defiance of its provisions."[2]

[2] Of course, as Judge Parker was careful to observe in *Draper*, it was the circumstance that the strike was "in violation of rights established by the collective bargaining statute," (145 F.2d at 205), which deprived it of its protected character. He therefore distinguished "a strike which, although not justified, nevertheless accords with the rights of the parties under the National Labor Relations Act." (*Id.*, citing *Labor Board* v. *Mackay Radio Co.*, 304 U.S. 333, 344, where this Court said "The wisdom or unwisdom of the men, their justification or lack of it, in attributing to [their employer] an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute." within the protections of § 7. See also *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 16.)

Moreover, the proposition that *Draper's* rationale incorporates a proper understanding of the basic structure and purposes of the NLRA does not mean that the limits of the rule stated therein are self-evident. As the court below stated "[Its] boundaries • • • are by no means definite. The cases have not produced a uniform approach to determine when concerted activity by a minority of employees loses the protection of section 7 due to a conflict with the exclusivity of the bargaining representative provided by section 9(a)." (485 F.2d at 925-926) But the area of controversy has been whether unauthorized activity for the purpose of compelling an employer to engage in meaningful bargaining with a majority representative is protected, (see *NLRB* v. *R. C. Can Co.*, 328 F. 2d 974 (C.A. 5)), and not, whether unauthorized activity designed to compel the employer to bargain directly with a minority group is protected. For, while an argument can be made that the former is not inconsistent with the collective bargaining the NLRA seeks to encourage, it is plain that the latter can not be squared with the Act.

2. The upshot is, as Mr. Justice Brennan has recently explained:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." (*Allis-Chalmers,* 388 U.S. at 180.)

After the most careful consideration Congress so structured the national labor policy because "the making of agreements [which is the ultimate aim of the NLRA] is impracticable in the absence of majority rule," (S. Rep. No. 573, 74th Cong. 1st Sess., p. 13, 1 Leg. Hist. (1935), p. 2313; see also H. Rep. No. 1147, 74th Cong. 1st Sess. p. 21; 1 Leg. Hist. (1935), p. 3071). And Congress reached this judgment after being fully advised both by the NAACP and by the Urban League that there were potential disadvantages therefrom for racial minorities. (See 1 Leg. Hist. (1935), pp. 1035-1036, 1059-1060.) These criticisms did not eventuate in a limitation on the majority rule concept because, as this Court has recognized, the NLRA, as it was proposed, and as it was enacted, contains compensating protections for individual employees (and minority groups) within a bargaining unit that by any calculus are more meaningful than the individuals' (or minority groups') pre-existing "power to order [their] own relations with [their] employer" that the Act "extinguishe[d]," (*Allis-Chalmers, supra.*). And, as this Court has also recognized, those protections apply uniformally to all individuals and minority

groups within a bargaining unit that find themselves at odds with the majority, and not only to racial minorities.[3]

The fountainhead of the relevant jurisprudence is *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 193, a suit challenging "restrictions on the employment of Negro firemen," negotiated by the exclusive representative of the firemen and the railroads in the southeast. (*Id.* at 194-196.) There the Supreme Court of Alabama:

> "construed the [RLA] not as creating the relationship of principal and agent between the members of the craft and the Brotherhood [representing the craft]; but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross." (*Id.* at 198)

This Court reversed. The essential premise of Chief

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[3] The added insights as to the Congressional purposes underlying the NLRA derived from the 1947 and 1959 amendments to the Act confirm this understanding. While there is nothing in those debates affirmatively sanctioning racial discrimination, in both instances Congress refused to amend the NLRA to add provisions specifically directed to remedy such discrimination. See 1 Legislative History of the Labor Management Relations Act of 1947, pp. 706-707 (rejection by Rep. Hartley of Rep. Marcantonio's FEPC amendment), p. 426 (Sen. Taft's explanation of the union shop proviso to § 8(a)(3)). See also the proviso to § 8(b)(1)(A) protecting "the right of a labor organization to proscribe its own rules with respect to the acquisition or retention of membership therein," the legislative history of which is fully described in *Allis-Chalmers*, 388 U.S. at 184-188. And see 2 Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (NLRB ed.), pp. 1648-1651 (rejection of Rep. Powell's amendment making racial, religious, national origin or sexual discrimination an unfair labor practice).

Justice Stone's opinion is that, under both the Railway Labor Act and the NLRA, where a bargaining unit has selected a majority representative, a racial minority in that unit does not have a right to bargain directly with their employer, even where the representative has acted in a manner antagonistic to the minority's interest:

> "Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. Virginian R. Co. v. System Federation, R. E. D. supra (300 US 545). The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. Order of Railroad Telegraphers v. Railway Exp. Agency, 321 US 342, and see under the like provisions of the National Labor Relations Act. J. I. Case Co. v. National Labor Relations Bd. 321 US 332, and Medo Photo Supply Corp. v. National Labor Relations Bd. 321 US 678." (*Id.* at 200.)

Indeed, the Court underlined this point by stating:

> "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, *the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.*" (*Id.* at 201-202; emphasis added.)

Because that is so, and in light of the structure and language of the provisions embodying the majority rule concept, the Court concluded:

> "While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.
>
> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. National Labor Relations Bd. supra (321 US 335), but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.
>
> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented • • • Without attempting to mark the allowable limits of differences in the terms

of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." (*Id.* at 202-203.)[4]

[4] Technically it is true as Chief Justice Stone stated that the RLA and the NLRA "deprive * * * the minority members of a [bargaining unit] of the right * * * to choose a representative of their own." (*Steele, supra.*) But the extent of that deprivation should not be overdrawn. In order to place the change in the law brought about by the present national labor policy in proper perspective it is necessary to remember the following: First, that the history of labor-management relations in this country allows no dispute with the basic truth that prior to the adoption of that policy there was an overriding "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association," (§ 1 of the Act). That, of course, was the very reason for the enactment of the NLRA. Second, that prior to 1935 there was no effective legal protection from discharge for an employee, or a group of employees (comprising either a majority or minority of the workforce) who demanded that their employer treat with them concerning their working conditions. That, of course, was the very reason for the inclusion in the NLRA of § 8(a)(1). Third, that prior to 1964 there was no effective legal protection for racial minorities against discrimination by their employer. That, of course, was the very reason for the enactment of Title VII of the Civil Rights Act of 1964. Finally, that, while it is true that but for the NLRA it is theoretically possible that an employer who was dealing with one group of employees would exercise the privilege of dealing also with another group comprising some or all of his racial minority employees, and that the result would be

Since in presently relevant respects the RLA and the NLRA are indistinguishable, the *Steele* rule governs NLRA majority representatives as well:

> "It is now well established that, as the exclusive bargaining representative of the employees in [the] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with [the employer], see Ford Motor Co. v. Huffman, 345 US 330; Syres v. Oil Workers International Union, 350 US 892, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 US 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N. R. Co., 323 US 192; Tunstall v. Brotherhood of Locomotive Firemen, 323 US 210, and was soon extended to unions certified under the NLRA, see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. at 342." (*Vaca* v. *Sipes*, 386 U.S. 171, 177; see also *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299-300.

3. The lesson of the argument thus far is that the Court of Appeals' reading of the NLRA is entirely wrong in every particular. Whatever the protection of § 7 for "wildcat" activity may be, it does not extend to picketing and

concessions to the latter that improved their position at the expense of the former, as a practical matter such a result is unlikely in the extreme.

related activity to secure direct bargaining with a minority representative once a majority representative has been certified by the NLRB. (Pp. 3-7.) A failure by the majority representative to meet its obligation to the minority does not create a § 7 right in the minority to utilize self-help to secure direct bargaining; it creates a cause of action for enforcement of the duty of fair representation. (Pp. 8-13.) The standard to which the majority representative is held is freedom from "arbitrary or bad faith conduct," (*Lockridge*, 403 U.S. at 299); it does not encompass an obligation to remedy the minority's complaint "to the fullest extent possible, by the most expedient and efficacious means," (485 F.2d at 931). (Pp. 11-13.) Each of the foregoing propositions is fully applicable where the minority's complaint is racial discrimination; indeed, the first was reaffirmed, and the latter two were announced in *Steele*, where the precise breach of the duty of fair representation alleged was racial discrimination.

4. The same conclusions follow if the NLRA is not considered alone but against the background provided by Title VII of the Civil Rights Act.

(a) The Court of Appeals began its analysis of the interrelationship between the two by noting:

> "While these activities are the subject of review by the Board only because they are deemed to be 'concerted activities' within section 7 and also involving 'conditions of employment' within section 9(a), the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, coexisting and perhaps inconsistent policies embodied in other legislation. As the Supreme Court noted in Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 47 (1942):
>
> '[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.' " (485 F.2d at 927-928.)

But *Southern Steamship* (a case in which the Board had held that conduct that may have constituted a "mutiny" under §§ 292 and 293 of the Criminal Code was protected by § 7 of the NLRA) is a caution that an administrative agency is not to expand the rights generally declared in the statute which it administers so as to provide protection for conduct which another law specifically prohibits. Here, the court below wrenched that call for caution out of context and utilized it as a basis for remedying under the NLRA, the employer's discharge of the pickets for engaging in activity not protected by § 7 but possibly protected under Title VII of the Civil Rights Act, a statute whose enforcement Congress entrusted not the NLRB but to the courts and the EEOC. The interrelationship between statutes and tribunals here therefore parallels not that in *Southern Steamship* but that in *Carpenters Union* v. *Labor Board*, 357 U.S. 93.[5] Accordingly, as *Carpenters Union*

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[5] There Mr. Justice Frankfurter explained:

> "[T]he Board • • • suggests that we should go further and find that the [hot cargo] contract provisions in these cases are invalid as such because the secondary employers are common carriers subject to the Interstate Commerce Act.
>
> • • • •
>
> "It is the [I.C.C.] that in the first instance must determine whether, because of certain compelling considerations, a

holds, the duty of the NLRB in this case was to decide

carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

"But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods of a shipper. Since he cannot effectively consent, there is, under § 8(b)(4)(A), a 'strike or concerted refusal,' and a 'forcing or requiring' of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a 'strike or concerted refusal,' or a 'forcing or requiring' of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner proscribed by § 8(b)(4)(A). Common factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations. • • •

"The case is not like that in *Southern S.S. Co.* v. *NLRB*, 316

whether the Employer's discharge of the employees violated § 8(a)(1) of the NLRA, and to leave to other tribunals the question whether it violated Title VII. And, while in its interpretation of § 7 *Southern Steamship* limited that concept so as to exclude employee conduct which was prohibited by other law, that case does not stand for the converse proposition that concerted activity which is protected under some other statutory scheme is necessarily protected under § 7 when it is antithetical to the purposes of the NLRA.

(b) It is manifest from the legislative history of Title VII that the enactment of that provision did not in any way alter the scope of § 7 of the NLRA. While the existence of a wide-ranging federal statutory remedy for employment discrimination is now taken for granted, the prospects of enacting such a law were so dubious that both "President Kennedy and Robert Kennedy were opposed to including an FEPC section [in the Civil Rights Act] because they thought it would kill the bill." (B. Rustin, *The Blacks And The Unions*, Harper's Magazine, May, 1971,

U.S. 31, where the Board was admonished not to apply the policies of its statute so single-mindedly as to ignore other equally important congressional objectives. A specific remedy ordered by the Board—reinstatement of employees who had engaged in a strike—worked directly to weaken the effectiveness of a statutory prohibition against mutiny by members of the crew of a vessel. Presumed illegality under the mutiny statute was not used to establish a violation of the labor statute. It was relied on to establish an abuse of discretion in giving a remedy. Much less was there any suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." (*Id.* at 108, 109-111)

pp. 73, 76.) One of the major reasons for its inclusion was that AFL-CIO President "George Meany pressed for it." (*Id.;* see also H. Rep. No. 1370, 87th Cong. 2nd Sess. pp. 4-5; Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2158-2159.) And the legislative situation was such that once Title VII had been included in the bill and had passed the House it could be enacted into law only if the support of at least two-thirds of the members of the Senate could be assured, and a conference with the House averted. For the opponents of any civil rights bill threatened a filibuster, both before Senate passage, and if that failed, on any conference report. The consequence was that the sponsors of the bill confined its scope, and particularly that of Title VII to meet the desires of certain key senators, and of the ranking Republican member of the House Judiciary Committee (Rep. McCulloch, the manager of the bill on the House side), whose approval was necessary to avoid a conference. (See Leg. Hist. (1964), pp. 3003, 3010.) The dynamic was therefore almost identical to that at the time of the 1947 amendments to the NLRA where the sponsors of the bill needed a two-thirds majority because of "a predictable presidential veto," (*Pipefitters* v. *United States,* 407 U.S. 385, 409). In construing the Civil Rights Act, as in construing the NLRA, "great weight" is therefore to be accorded the statements of the sponsors made "to assure colleagues who had reservations • • • and whose votes were necessary" to make possible the enactment of the legislature in any form. (*Id.*)

There is a further parallel between the legislative situations in 1947 and 1964 in that once again the opponents sought to defeat the legislature by overstating its scope. (Compare *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S.

270, 288.) Given the nature of the coalition supporting the measure Senator Hill of Alabama charged that enactment of Titles VI and VII of the bill would have serious adverse effects on union and employee rights under the NLRA. (See Leg. Hist. (1964), p. 3242.) Senator Clark, one of the floor managers of the bill, responded directly to Senator Hill's assertions and unequivocally denied them, inserting into the Record a Justice Department memorandum which said, in immediately pertinent part:

> "Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. Of course, title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. To what extent racial discrimination is covered by the NLRA is not entirely clear. I understand that the National Labor Relations Board has presently under consideration a case involving the duties of a labor organization with respect to discrimination because of race. At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. On the other hand, where the procedures of title VII are invoked, the remedies available are those set out in section 707(e), injunctive relief against continued discrimination, plus appropriate affirmative action including the payment of backpay. No court order issued under title VII could affect the status of a labor orga-

nization under the National Labor Relations Act or the Railway Labor Act, or deny to any union the benefits to which it is entitled under those statutes." (Leg. Hist. (1964), p. 3244).

Accordingly, the Court of Appeals' view that § 7 of the NLRA is to be expanded in light of Title VII of the Civil Rights Act, is contrary to intent of the sponsors of the Civil Rights Act, as well as having no basis in the NLRA.[6]

[6] The Court of Appeals' reasoning is not strengthened by the language of § 704(a), the particular provision to which it pointed. (485 F.2d at 927) The report of the House Judiciary Committee, where this language originated, demonstrates that § 704(a) is narrowly conceived: "[This Section] makes it an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has made a charge, testified, assisted, or participated in any manner in the enforcement of the title." (H. Rep. No. 914, 88th Cong. 1st Sess., pp. 27-28, Leg. Hist. (1964), pp. 2027-2028.) That is not an explanation that supports the view that § 704(a), contrary to the overall philosophy of the Civil Rights Act which is to promote administrative and judicial redress of claims of racial discrimination (see *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 42 U.S.L.Wk. 4214, 4216), protects a form of self-help not protected by the NLRA. There is no other authoratative explanation of § 704(a) since Title VII was not the subject of a Senate Report and since there was no floor debate on that provision.

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed and the cause remanded with directions to dismiss the petition for review and affirm the order of the Board.

Respectfully Submitted

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006